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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANE BRAY, OPERATION RESCUE, *et al.*
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., (LDF) is a non-profit corporation established to assist African Americans in securing their constitutional and civil rights. LDF has litigated civil rights issues in federal court since 1941, relying in many instances on the Reconstruction-era civil rights statutes. LDF seeks to ensure the continued vitality of 42 U.S.C. § 1985(3). The statute protects civil rights lawyers and other advocates who travel from state to state in the struggle for racial equality. It also guarantees that the legal rights of a minority, even when opposed and resented by the majority, will not be nullified at the will of a mob.

LDF supports the rights of women to reproductive health services, including access to abortion and abortion counseling. Most clinics affected by the injunction in this case serve Medicaid patients and have sliding fee schedules for low income women. Because of disproportionately high poverty rates among African Americans, many African American women in the northern Virginia area would not receive necessary reproductive health services if the clinics were closed by blockades.

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SUMMARY OF ARGUMENT

Two separate substantive clauses of 42 U.S.C. § 1985(3) prohibit the conspiracy of the defendants in this case. The first clause — the "private deprivation clause" — forbids purely private conspiracies, motivated by invidious animus, that deprive persons of constitutional rights. Operation Rescue violated that clause by conspiring with

gender animus to deprive women of their constitutional right to travel. The second applicable clause of § 1985(3) — the "hindrance of the state clause" — forbids conspiracies that purposefully hinder the state's ability to secure equal protection of the laws in order to deprive persons of constitutional rights. Operation Rescue also violated that clause, and it is this second type of violation which is the focus of this brief.

Operation Rescue violated the hindrance of the state clause of section 1985(3) by summoning hundreds of demonstrators to crowd tightly around the plaintiff clinics, purposefully outnumbering and refusing to cooperate with the police, in order to prevent the police from securing plaintiffs' access to the clinics, thereby depriving plaintiffs of their constitutional right to abortion. In forming these blockades, defendants acted upon the state in precisely the manner prohibited by the hindrance clause. Because hindrance involves the state, the hindrance clause remedies constitutional rights guaranteed against state infringement, such as the plaintiffs' right to abortion.

Unlike claims under the private deprivation clause of § 1985(3), claims under the hindrance clause need not

include proof of invidious class animus. All persons are entitled to equal protection of state law without regard to whether they belong to a group that is otherwise granted heightened constitutional or statutory protection. Moreover, even if class animus is required, Operation Rescue's anti-abortion efforts clearly amount to animus against women. The close nexus between women's reproductive capacity and their gender identity has led Congress and this Court in other contexts to recognize discrimination based on reproductive capacity as sex discrimination. It would be consistent with the purposes of the statute to hold that Operation Rescue's class animus against women seeking abortions is prohibited by § 1985(3) as well.

ARGUMENT

INTRODUCTION

At issue in this case is the illegality under 42 U.S.C. § 1985(3) of blockades orchestrated by Operation Rescue during which mobs of people, often numbering in the hundreds, physically prevent women from entering or leaving reproductive health clinics and purposefully frustrate local police efforts to secure access to the clinics. Both the district court and the court of appeals properly held that such blockades violate § 1985(3) as interpreted in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and Respondents largely rely on the theory of *Griffin* in their brief urging affirmance. *Amicus* agrees that this Court should affirm on the basis of *Griffin*, because a conspiracy to block women from entering clinics to have abortions, like the conspiracy in *Griffin* to stop African Americans on a public road and beat them, deprives plaintiffs of their right to travel in violation of § 1985(3).

Amicus submits this brief, however, in order to elaborate an additional ground upon which Respondents urge affirmance. *See* Respondents' Brief, Point II.B. The second clause of § 1985(3), which was not applicable in *Griffin*,

specifically prohibits conspiracies like Operation Rescue's which *hinder local law enforcement*. Thus, if this Court disagrees that affirmance is required under the first clause of § 1985(3), it should nonetheless affirm for independent reasons under the second clause.

The first two clauses of § 1985(3), although similarly worded, address distinct forms of illegal conspiracy, *both* of which occurred in this case, but only the *first* of which was at issue in *Griffin* and this Court's other post-*Griffin* § 1985(3) cases. The first clause of § 1985(3) — the "private deprivation clause" — prohibits conspiring

> for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States.

Defendants in this case conspired to deprive plaintiffs of their travel rights in violation of this clause. They also, however, prevented the police from securing access to the clinics, and thereby hindered state authorities from securing equal protection, in violation of the second clause of § 1985(3) — the "hindrance of the state clause." This clause

prohibits conspiring

> for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States.

The crucial additional element present here that supports application of the second clause is Operation Rescue's organized attempt to overwhelm the police and temporarily to institute mob rule in order to prevent plaintiffs from exercising their constitutional rights.

The logic behind the hindrance clause is that the constitutional requirement that the state secure to all persons equal protection of the laws must not be circumvented by a private mob preventing the state from securing equal protection. It applies here because, for example, if Falls Church, Virginia were voluntarily to withhold police protection from women seeking to visit the Commonwealth Women's Center out of a desire to prevent women from having abortions, the city would have violated the women's constitutional rights to abortion; where a mob seeks to achieve the same results — denying women their constitutional rights — by hindering and obstructing the city

from protecting people exercising those rights, the mob action violates the hindrance clause of § 1985(3).

A similar threat to state law enforcement would be posed by conspiratorial blockades that purposefully prevented African American and white children from attending integrated schools, kept members of a religious congregation from entering their temple, mosque, or church, or barred voters from the polls in a Hispanic neighborhood. Such blockades violate § 1985(3) because they constitute a conspiracy to nullify the constitutional rights of a disfavored class by overwhelming the state's ability to protect that class's rights. The role of state law in securing personal liberty and civil rights for all cannot be fulfilled when nationwide conspiracies are permitted purposefully to deny state-law protection to certain groups. Section 1985(3) thus complements state and local governments' efforts to provide legal protection when their ability to do so is most challenged.

In this case, the Falls Church police did all they could to secure the protection of state law to women in this action as plaintiffs sought to enter Commonwealth Women's Clinic to receive or render services there. Local and state efforts

proved inadequate, however, against the masses of people participating in the Operation Rescue blockade. The police force, even as supplemented at the city's expense by county and state law enforcement officers, was unable to secure access to the clinic for as long as six hours. During that time many patients were unable to receive medical treatment, including scheduled abortions.

It has only been since the federal court in this case entered an injunction under § 1985(3) against the blockades that the protections of state law have again been equally secured for women seeking constitutionally protected services from Commonwealth Women's Clinic. Operation Rescue now regularly conducts lawful, First Amendment-protected demonstrations outside the Commonwealth Women's Clinic. With the support of the federal court injunction, those women who choose to seek services at the picketed clinics are now able to do so.

In order to affirm, this Court need only determine that there is a substantial federal question supporting federal jurisdiction. The district court entered its injunction based on both state and federal law. As long as the district court properly exercised its federal jurisdiction, its decision must

stand on the unchallenged state law grounds. Because there is at the very least a substantial federal question under one of the two prongs of § 1985(3) at issue here, the decision of the district court must be affirmed.

I. OPERATION RESCUE VIOLATED 42 U.S.C. § 1985(3) BY CONSPIRING "FOR THE PURPOSE OF PREVENTING OR HINDERING" LOCAL AND STATE AUTHORITIES FROM "GIVING OR SECURING" TO THE PLAINTIFFS "THE EQUAL PROTECTION OF THE LAWS"

The Operation Rescue activities challenged in this case are plainly prohibited by 42 U.S.C. § 1985(3). Defendants' organized, conspiratorial efforts are designed expressly to hinder and prevent the local and state police from securing protection of the laws to plaintiffs that is equal to that enjoyed by persons who are not seeking to exercise their constitutional right to abortion. Section 1985(3) explicitly forbids such a conspiracy to nullify federal rights by frustrating state law enforcement. Operation Rescue's blockade was so effective that it completely prevented state and local police from protecting the plaintiffs. Like the inability of former Confederate states in the wake of the Civil War to protect African Americans and their Republican

supporters in the face of Ku Klux Klan mobs, the inability of municipal and state police to protect plaintiffs, despite their best efforts, worked a deprivation of plaintiffs' constitutional rights that is properly remedied under § 1985(3).

A. Defendants conspired to prevent police from equally enforcing state laws so as to protect women attempting to enter plaintiff clinics

The hindrance clause of 1985(3) "deal[s] explicit[ly]" with "interference with state officials," or "interference with or influence upon state authorities." *Griffin*, 403 U.S. at 98-99. The clause addresses the particular threat that private mob action poses to the rights of individuals when the mob prevents state governmental mechanisms from enforcing such rights. The clause is not directed at states' active impairment of rights, which 42 U.S.C. § 1983 addresses. Rather, Congress enacted it to provide a remedy where mob coercion renders state law ineffective. Newly elected Republican Southern state governments during Reconstruction faced precisely this problem from Ku Klux Klan-organized mobs: "The States themselves were

helpless" to enforce their laws. *United States v. Price*, 383 U.S. 787, 804 (1966). The section's second clause was written to respond to this problem. Thus, private conspirators' liability under that clause for hindering state and local officials from enforcing state law does not depend on complicity of state governments, but rather depends on whether the private conspiracy effectively has obstructed the operation of state law.

This Court over a century ago acknowledged that the language of the hindrance clause covers private conspiracies that seek to block state law enforcement. Just sixteen years after the passage of § 1985(3), the Court in *United States v. Harris*, 106 U.S. 629 (1883), reviewed criminal convictions based in part on a criminal statute that paralleled verbatim the hindrance clause of § 1985(3). The Court found that the clause covered a conspiracy by twenty armed defendants to break into the county jail and attack four prisoners in violation of Tennessee law. The defendants were charged with "preventing and hindering the constituted authorities of the State of Tennessee," specifically the sheriff, from safely keeping the prisoners in custody pending their trials, *i.e.*, from securing to them "equal protection of the laws of the

State of Tennessee." 106 U.S. at 631.[1] The Court found that the allegations in the indictment were within the terms of the criminal statute corresponding to the hindrance clause of § 1985(3), but it struck the statute as unconstitutional on grounds not relevant today. *Id.* at 644.[2]

The district court in this case found that Operation Rescue sought to stop abortions by obstructing and interfering with local and state law enforcement to the point where plaintiffs enjoyed no protection of state law. As the court explained, "[a]t a 'rescue,' the demonstrators, called 'rescuers,' intentionally trespass on the clinic's premises for the purpose of blockading the clinic's entrances and exits,

[1] This Court has since confirmed that the statutory phrase "equal protection of the laws" includes the protections of state law. *See Briscoe v. LaHue*, 460 U.S. 325, 337-38 (1983); *Griffin*, 403 U.S. at 103.

[2] The Court held that Congress did not have power to penalize all conspiracies to which the statute's language might conceivably be applied, such as conspiracies in which no government authorities, however hobbled, are involved. The constitutional determination would, of course, be resolved differently today. Under current law, federal courts are obligated to construe statutes so as to avoid any constitutional issues. *See, e.g., Griffin*, 403 U.S. at 104 ("we need not find the language of § 1985(3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the complaint in this case"). There is no question, in light of current understandings of Congressional power, that Congress has the authority to reach the conduct of defendants in this case, whether under the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), or under the commerce clause, *Katzenbach v. McClung*, 379 U.S. 294 (1964).

thereby effectively closing the clinic." *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1487 (E.D.Va. 1989). During a "rescue," plaintiffs do not enjoy the protection of state law. They cannot use their property free from trespass, enter contracts for medical service free from intentional interference and obstruction, or walk and drive on public roads unmolested.

The district court's findings that Operation Rescue intentionally hindered the state from providing equal legal protection are amply supported by the record. As Operation Rescue's own pamphlet explains: "1000 or 1500 peacefully praying around an abortion mill will be *very difficult* to arrest! In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved." R. 484 (emphasis in original).[3] Operation Rescue vowed to close down the plaintiff clinics. R. 73, 78. The clinics were "barraged by people" from Operation Rescue at least once a week. R. 70-71. "Rescue" participants blocked access to the clinics and assaulted staff, patients, and police trying to get through. R. 72. The

[3] Citations in the form "R. ___" refer to the record pages in the Court of Appeals Appendix.

police were required to respond on numerous occasions, but even "a concerted effort by the police department to arrest these people" would take "[h]ours," during which the clinic would remain closed. R. 97. Joint efforts by local and state law enforcement agencies were overwhelmed.

The "rescue" at Falls Church on October 29, 1988 followed Operation Rescue's pattern:

> Typical of most 'rescue' demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a clinic for some period of time.

Id. at 1489 n.4. Police Lieutenant Gregory King testified that an Operation Rescue leader "told me that the rescue mission would cease if I could guarantee that there would be no abortions at the clinic that day. And of course I couldn't guarantee those kinds of things." R. 212. He described in detail the hindrance that local and state police departments experienced at the hands of Operation Rescue:

> We have 30 sworn members. So, what that entails is getting together with four other agencies, I use the Arlington County Sheriff's Department, the Arlington County Police Department, the Virginia State Police and sometimes Virginia Department of Corrections to coordinate arrest procedures on the scene.
>
> Any time we have over 100 people to arrest, it would require just about all those agencies being joined together to make it work....
>
> [W]e knew that our clinic was going to be hit and we were able to plan and we were there long before it even got started. But [the clinic] still went down, yes.

R. 213-14. Notwithstanding some successful arrests and prosecutions, the blockades continued to occur. R. 107.

Operation Rescue's literature specifically urges local officials not to provide legal protection to plaintiffs:

> Our local civil authorities need not bow to Justice Harry Blackmun -- or for that matter, to our own abortion enthusiast, Barbara Mikulski. Our local authorities have responsibility for this municipality.... In defiance of Supreme Court edicts, our community can refuse to tolerate legalized childslaughter. That is only a starting point.

Pltfs. Exh. 11 (R. 472).[4] Operation Rescue seeks to

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[4] Operation Rescue members make no secret of the fact that they place themselves above the law. One witness recalled remarks of Operation Rescue leader Patrick Mahoney at an Operation Rescue conference:

> [Mahoney] mentioned the fact that there were injunctions out in the area and the emergency legislation that had passed in the D.C. area. And he said basically that these measures would not interfere with what they had come to do this weekend, which was to rescue on Friday and Saturday.

undermine federal protection for abortion rights by ensuring that state laws are not equally enforced on behalf of women seeking to use clinics where abortions are available.[5]

Violation of state law is not merely incidental to the

R. 232.

Operation Rescue's direct assault on judicial enforcement of rights in this case is typical of its conduct elsewhere. In New York, Operation Rescue founder Randall Terry "acknowledged his intention to disobey the district court's contempt order, and asked, '[w]ill we let this N.Y.C. court intimidate us back into silent cooperation with the killing .... [o]r will we face down this judge's order ...?'" *New York State NOW v. Terry*, 886 F.2d 1339, 1345 (2d Cir. 1989).

[5]Some Maryland law enforcement officials complied with Operation Rescue's suggestion that they simply refrain from protecting the state-law rights of women seeking abortions and of the clinics that provide them. Police Sergeant Walker in Forestville, Maryland requested that clinic staff close the Hillview Medical Center in anticipation of an Operation Rescue onslaught. R. 262. The clinic administrators said they could not do that, and attempted to open the clinic. When Operation Rescue blockaded it, police Captain Downs stated "We're outnumbered. There's nothing we can do." R. 273. He explained "I cannot pull all the resources from the county.... There's no help. We have 80 men, and I've already pulled the resources from the county ... and the state police. And we're doing all we can do." R. 276. A police liaison later concurred with Downs' assessment that the officials were overwhelmed: "You have to close because there's nothing we can do and it's not going to disband." R. 278. Patients who had not eaten for several hours in anticipation of surgery, some of whom were bleeding and in need of immediate medical care, were blockaded in cars and inside the barricaded clinic while Operation Rescue prevented the surgical staff from entering. R. 271. A clinic administrator testified that the police "told me we were on our own" in getting patients safely out of the clinic past the Operation Rescue people. R. 278.

Similarly, in Dobbs Ferry, New York, Operation Rescue "entered into an express agreement with police officers that no demonstrators would be arrested so long as they agreed to leave the site by noon of that day." *New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990).

activities of Operation Rescue; the very purpose of its campaign is to overwhelm the capacity of the police to keep the facilities open. It is by frustrating police efforts to keep open the clinics and to protect plaintiffs' lawful use of clinic facilities that Operation Rescue succeeds in stopping some planned abortions. As Operation Rescue founder Randall Terry explained, "over 15 years of education and political lobbying have gotten us virtually nowhere." Pltfs. Exh. 1 (R. 444).[6] Thus, instead of relying on speech and political persuasion, Terry organizes coercive blockades.

The hindrance clause of § 1985(3) is not limited to prohibiting conduct under color of law. This Court in *Griffin* unanimously rejected the requirement that the private deprivation there complained of be inflicted under color of state law, because "[t]o read any such a requirement into § 1985(3) would ... deprive that section of all independent

---

[6]The enjoined operations are distinct from First Amendment-protected activities by which participants attempt to change the conduct of others through symbolic or verbal persuasion. *Cf. Texas v. Johnson*, 109 S.Ct. 2533 (1989). The distinct aim of a "rescue" operation is not simply to exercise rights of association and expression, but to outnumber the police and to flood the area surrounding a clinic so completely that women are prevented from entering *not* because they have been *convinced* to doubt their choice to go in, but because they *physically cannot*. When a rescue succeeds, it is because local law has been rendered ineffective to protect the women seeking to enter the clinics.

effect." 403 U.S. at 99; *see also id.*, at 97 (holding that "there is nothing inherent in the phrase ['equal protection of the laws'] that requires the action working the deprivation to come from the State"). As the Court noted in *Monell v. New York City Department of Social Services*, "[§ 1985(3)] as passed, unlike [§ 1983], prosecuted persons who violated federal rights *whether or not that violation was under color of official authority*, apparently on the theory that Ku Klux Klan violence was infringing the right of protection as defined by [*Corfield v.*] *Coryell*. [4 Wash CC 371 (CC ED Pa 1825)]" 436 U.S. 658, 670 n.21 (1978) (emphasis added).[7]

Griffin's reasoning that the deprivation clause of § 1985(3) must be read so as not to duplicate the coverage of § 1983 is equally true of the hindrance clause. Each of these contemporaneous statutory provisions prohibits a distinct kind of conduct. Section 1983 applies against deprivation of rights under color of state law. The first clause of § 1985(3) provides a remedy against private

[7]The 1871 Congress read *Coryell* as defining a Fourteenth Amendment right to "protection by the government," not limited to protection from unequal treatment but including affirmative rights to state protection of person and property.

conspiracies to deprive persons of their legal rights, and the second clause remedies deprivations of rights at the hands of private conspiracies that disable the state from protecting plaintiffs' rights. *Kush v. Rutledge*, 460 U.S. 719, 724-25 (1983). Where the deprivation is committed under color of law, § 1983 provides a remedy against public and private persons alike. *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970). The distinct role of the hindrance clause of § 1985(3) is to remedy deprivations carried out not under color of law, but by displacing the law with the force of mob rule.

B. Defendants' conspiracy blocked plaintiffs from exercising their federal constitutional right to abortion

Operation Rescue infringed plaintiffs' constitutional abortion rights in precisely the manner prohibited by § 1985(3). The statute forbids conspiratorial action whereby a person is "deprived of having and exercising any right or privilege of a citizen of the United States." It thus applies

to all rights enjoyed by a United States citizen.[8] Although it remains unsettled whether the statute also remedies violations of federal statutory rights or of rights created by the states, *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 833-34 (1983), it is clear that federal constitutional rights are protected.[9] Thus, even in the view of those who would confine § 1985(3) coverage to "conspiracies to violate those fundamental rights derived from the Constitution," *Great American Savings & Loan Association v. Novotny*, 442 U.S. 366, 379 (1979) (Powell, J., concurring), defendants' conspiracy to violate plaintiffs' right to abortion is covered.[10]

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[8] *Cf. United States v. Price*, 383 U.S. 787, 800 (1966) (holding that the reference in 18 U.S.C. § 241 to rights secured by "the Constitution or laws of the United States" means that the statute embraces rights secured by "*all* of the Constitution and *all* of the laws of the United States").

[9] The legislative history shows that the statute was aimed at remedying more than simply violations of federal constitutional rights. Cong. Globe, 42d Cong., 1st Sess. 375 (Rep. Lowe); *id.* at 428 (Rep. Beatty); *id.* at 506 (Sen. Pratt); *id.* at 514 (Rep. Poland).

[10] Another right at issue here, of course, is plaintiffs' constitutional travel right. *Amicus* agrees with the position advanced in Respondents' brief that defendants' conspiracy violated plaintiffs' right to travel. That right is assertible against purely private conspiracies, and defendants would be liable for violating it even had they not affected the government.

Because defendants did act upon the state, however, they are also liable for obstructing plaintiffs' access to abortion. Application of the hindrance clause to abortion is exclusively discussed here because of the distinct issues it raises.

As the district court found, Operation Rescue intentionally prevented women from obtaining abortions. Operation Rescue members "trespass on to clinic property and physically block ingress into and egress from the clinic, [so] existing and prospective patients, as well as physicians and medical staff are unable to enter the clinic to render or receive medical or counselling services." 726 F. Supp. at 1489. They do so in order "(i) to prevent abortions, [and] (ii) to dissuade women from seeking a clinic's abortion services ...." *Id.* at 1488. The record shows that Operation Rescue participants in fact did prevent women from entering the clinic by blocking the doors to the clinics with their bodies and with trash dumpsters. R. 75.

The fact that the right to abortion has been the subject of much controversy only underscores the need for protection of its exercise under § 1985(3). When the statute was passed, the Thirteenth, Fourteenth, and Fifteenth Amendments were at least as controversial, as was the notion of extending other constitutional rights to African Americans. The Ku Klux Klan sought to prevent

Republicans and African Americans from exercising their new constitutional rights by committing torts and crimes such as assault, battery and lynching. Congressional Globe, 42nd Cong., 1st Sess. 157 (Sen. Sherman); *id.* at 320-21 (Rep. Stoughton); *id.* at 412-13 (Rep. Roberts); *id.* at 444 (Rep. Butler). It was precisely because the rights created by the Reconstruction Amendments were not universally accepted that Congress enacted the Civil Rights Act of 1871 to enhance the remedies accorded for violations of such rights. Women's reproductive freedom is similarly under broad attack by Operation Rescue, a nationwide conspiracy to undermine the exercise of abortion rights. Defendants in this case, like the conspirators at whom § 1985(3) originally was aimed, seek forcibly to revoke constitutional rights that they have been unable to repeal through legal and political processes.

The efforts of law enforcement authorities to prevent defendants' interference with plaintiffs' rights do not obviate the fact that Operation Rescue blockades "involve or affect" the state as required under the hindrance clause as interpreted in *Carpenters*, 463 U.S. at 831. In rejecting a claim that a conspiratorial deprivation of First Amendment

rights by purely private actors is redressable under § 1985(3), the Court in *Carpenters* contrasted the conduct of the private defendants in that case with circumstances in which "the aim of the conspiracy is to influence the activity of the State." *Id.* at 830. In the latter situation, the state is sufficiently affected to sustain application of the hindrance clause of § 1985(3) to remedy violations of constitutional rights otherwise assertible only against the state. In his dissenting opinion in *Carpenters*, Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor, agreed with the majority's legal interpretation of the hindrance clause, explaining that:

> The Court does not require that the conspirators be state officials or act under color of state law. Instead, the requirement is that the conspiracy intend to cause the State or a person acting under color of state law to deprive the victims of the conspiracy of their constitutional rights.

Id. at 840 n.2. What is needed under the hindrance clause is "state involvement in the form of an intent [by private defendants] to interfere with state officials." *Id.* at 848-49 and n.13. Thus, the intent of the private defendants is sufficient, and need not be accompanied by invidious intent on the part of the government.

The right to abortion that Operation Rescue obstructs is an independent right that supports a claim under § 1985(3). "Section 1985(c) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny*, 442 U.S. at 372. It "is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right ... is breached by a conspiracy in the manner defined by the section." *Id.* at 376. Because the rights infringed in *Carpenters* were First Amendment rights, and the First Amendment restrains only official conduct, the failure to show any effect on the state was fatal to plaintiffs' claim. 463 U.S. at 833.

Operation Rescue, in contrast, did affect government actors. It sent people to glut the area surrounding reproductive health clinics with demonstrators so as to outnumber the police and prevent them from keeping the clinics open. This is just the kind of private action that Justice Stevens, concurring in *Novotny*, explained does involve the state:

> if private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(c).

442 U.S. at 384 (footnote omitted). The Court in *Griffin* similarly took for granted that either hindrance of law or massive private lawlessness would support § 1985(3) liability. 403 U.S. at 98-99. Where a private conspiracy acts on the state as described in *Griffin*, *Novotny*, and *Carpenters*, there is sufficient infringement of state protection of persons exercising constitutional rights to support a section 1985(3) remedy, even where the conspiracy impairs constitutional rights protected only against deprivation by the government.[11] This result is required by the statute's recognition, in the hindrance clause, of the practical equivalence between a state withholding its protection from people exercising certain rights and a private conspiracy coercing the state into not giving protection.

The legislative history clearly supports the view that active governmental complicity is not required.

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[11] *See, also, Collins v. Hardyman*, 341 U.S. 651, 661 (1951) (finding no liability against private defendants because "[t]here is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it").

Representative Poland argued:

> if a state shall deny the equal protection of the laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the state authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States.

Cong. Globe, 42d Cong., 1st Sess. 514 (Rep. Poland). Analogously, Senator Morton stated, "If a state fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether the failure is willful or the result of inability can make no difference." *Id.* at App. 251 (Sen. Morton). Many other members of Congress expressed similar views.[12] The Court should give effect in this case to Congress's clearly expressed intent to provide a remedy when an organized mob overwhelms law enforcment authorities and prevents them from protecting individual rights.

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[12] See id. at 428 (Rep. Beatty) (stating that the State can deny equal protection through either lack of power or inclination); id. at 459 (Rep. Coburn) (stating that a private conspiracy to fetter arrest denies equal protection); id. at 481-82 (Rep. Wilson) (stating that Congress has power to enact protective legislation when a State is unable to execute its laws equally); id. at App. 315 (Rep. Burchard) (stating that hindrance of state's ability to secure equality of protection violates the statute).

II. CLASS ANIMUS IS NOT A REQUIRED ELEMENT OF A HINDRANCE CLAIM

Defendants' intent to deprive women of their constitutional right to abortion constitutes invidiously discriminatory class animus. Point III., *infra*. However, under § 1985(3)'s hindrance clause, class animus is not a necessary element of plaintiffs' claim. Where a conspiracy acts *against the state* to impair *any* group's equal enjoyment of the state's affirmative legal protection, Congress provided a remedy in the hindrance clause of § 1985(3).

The class animus requirement is not explicit in the text of § 1985(3). Unlike 42 U.S.C. §§ 1981 and 1982, which grant all citizens the exercise of certain rights as are "enjoyed by white citizens," § 1985(3) does not by its terms prohibit only racial discrimination. The deprivation clause of § 1985(3) applies to "*any* persons or class of persons," and the hindrance clause protects "*all* persons."

The limitation of § 1985(3) coverage to purely private conspiracies acting with "some racial, or perhaps otherwise class-based invidiously discriminatory animus" is a judicial construction of the word "equal" in the first clause of § 1985(3). *Griffin*, 403 U.S. at 102. In determining that

the language of the first clause of § 1985(3) did not preclude its application to purely private conspiracies, the Court in *Griffin* expressed concern about "[t]he constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law." *Id.* The Court avoided such a sweeping interpretation of that clause by identifying in the legislative history some indications that, as to purely private conspiracies, a requirement of class animus inhered in the statute's guarantee of "*equal* protection, or *equal* privileges and immunities." *Id.*[13]

Griffin's construction of the term "equal" in the deprivation clause as prohibiting only invidious class animus does not apply to the hindrance clause. This difference

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[13]*Griffin* relied on legislative history in construing "equal protection" because the phrase is not defined in the text of § 1985(3). But that phrase is defined in another provision of the 1871 Act in a manner supporting the conclusion that no invidious animus need be shown for hindrance claims. Section 3 of the unconsolidated version of the 1871 Act "deemed" it to be "a denial ... of the equal protection of the laws" for a State to be unable to protect "any *portion* or class of the people" from a conspiracy to deprive them of their constitutional "rights, privileges, or immunities, or protection." Section 3 was aimed, among other things, at "insurrection, domestic violence, unlawful combinations or conspiracies" that "obstruct or hinder the execution of the laws," and authorized the President to use federal military force to suppress the insurrection. Thus, § 3 addressed circumstances more extreme than but parallel to those described in the hindering clause of § 2 of the 1871 Act, (§ 1985(3)). The statutory reference to a "portion" of the people suggests that *all* types of people — whether or not otherwise specially protected by the constitution or statutes — may seek remedies under the hindrance clause.

derives from the distinction between the constitutional concepts on which each clause is based. An obligation to *give* or *secure* "equal protection of the laws" is, in its most literal sense, an affirmative requirement that the state equally enact and apply its laws to all persons unless it has a legitimate reason for distinguishing among persons. It does not depend on invidious animus, whether based on race, gender, or some other "suspect" characteristic. This is the constitutional concept referred to in the hindrance clause of § 1985(3), and it applies only where the state is somehow involved. In contrast, the constitutional concept of refraining from *depriving* persons of "equal protection of the laws" is also applicable to purely private conduct, through legislation, as a negative prohibition on certain invidiously motivated action. This is the concept referred to in the private deprivation clause of § 1985(3). Thus, while private conspirators' deprivation of rights are guaged by their animus, *see Griffin*, 403 U.S. at 102, conspiracies causing

the government to fail to secure legal protection should not be.[14]

The legislative history of § 1985(3) shows Congress's intent, where equality of legal *protection by government* was at stake, to include *all* groups within the statute's coverage. Representative Buckley explained:

> The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property, liberty, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes, will be benefitted alike, because we are simply contending for good government and righteous laws.

Id. at 190. Representative Lowe stated, early in the debates, "[e]very consideration of justice and good faith requires that *protection* be given to all classes in all States; to persons of every complexion and of whatever politics." *Id.* at 376 (emphasis added). Representative (later President) Garfield spoke in favor of equal laws and equal administration of them in terms that reflect the right of *all* persons to equal

[14]The Court's comment in *Griffin* that it "need not decide ... whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable *under the portion of § 1985(3) before us*," 403 U.S. at 102 n.9 (emphasis added), suggests that the animus analysis differs under other portions of the statute, such as the hindrance clause at issue here.

governmental protection:

> It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to *any* class of citizens, either by the courts or the executive officers of the State.

Cong. Globe, 42d Cong., 1st Sess. App. 153 (emphasis added). Representative Barry, using the verb "to secure" which appears in the hindrance clause and not the deprivation clause, said that the Act sought broadly to "secur[e] to *all* men, white or black, native or adopted citizens, an entire, an inviolable, an unquestionable equality before the law." *Id.* at 267 (Rep. Barry). Thus, where legal protection by the government is impaired, *i.e.* where a claim arises under the hindrance clause, invidious class animus is not required.

This interpretaion is consistent with the reasoning of *Griffin*. The risk of creating "a general federal tort law" prompted the Court in *Griffin* to emphasize that purely private conspiracies are only covered when they act out of invidious animus, 403 U.S. at 102. Prohibition of conspiracies that hinder the state, without regard to their

invidious animus, does not create this risk.

It was *Griffin's* recognition that the deprivation clause reached private conspiracies that revealed such a threat. The hindrance clause, in contrast to the deprivation clause, applies only to conspiracies that prevent or hinder the state from securing legal protection to persons within its boundaries. The primacy of state law enforcement is thus explicitly recognized by the clause, and the § 1985(3) remedy is available only to supplement obstructed state efforts. Far from usurping state tort law, the hindrance clause thus acts as a federal safeguard against conspiratorial efforts to render state law ineffective.

The presence of the word "equal," from which the Court in *Griffin* derived the class animus requirement, in the hindrance clause's reference to "equal protection of the laws" does not mean that class animus is also required under that clause. It is true that the Court in *Kush v. Rutledge*, 460 U.S. 719, 726 (1983), viewed the absence of the word "equal" in the first part of § 1985(2) as "of greatest importance" in supporting its holding that no class animus is required under that portion of the 1871 Act; there surely can be no judicial construction applicable to a term that does not

appear. The question remains, however, whether the same construction is appropriate every time such term does appear.[15] In *Kush*, as in *Griffin*, the Court's analysis focused on the risk of "extend[ing] federal authority and displac[ing] state control over private conduct." 460 U.S. at 726. Because the hindrance clause is aimed at *enhancing* the effectiveness of state law, *Kush*, like *Griffin*, suggests that the class animus limitation does not apply to hindrance claims.

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[15]It is more noteworthy that the word "equal" precedes "privileges and immunities" in the deprivation clause than that it appears in the phrase "equal protection" in both the deprivation and hindrance clauses. These statutory terms derive from the Fourteenth Amendment, albeit loosely, *see Griffin*, 403 U.S. at 97, but there is an "extra equal" in the deprivation clause only, and not in the hindering clause.

III. OPERATION RESCUE'S INVIDIOUS ANIMUS AGAINST WOMEN SATISFIES ANY CLASS ANIMUS REQUIREMENT THAT MIGHT APPLY

If the Court determines that class animus must be shown even under the hindrance clause, the decision below should be affirmed because Operation Rescue acted with animus against women seeking abortions. This Court has yet to define the precise scope of the class animus requirement under § 1985(3). The Court held in *Griffin*, 403 U.S. at 102, that a conspiracy motivated by racial animus violated the statute, but held in *Carpenters*, 463 U.S. at 835, that a conspiracy motivated by economic animus against non-unionized workers did not. *Griffin* left open what kinds of non-racial animus might be actionable, 403 U.S. at 102, and *Carpenters* similarly dealt with the particular conspiracy before the Court without laying out general principles for evaluating defendants' motivation under § 1985(3). *Carpenters* explicitly declined to decide whether the statute forbids the conspiracies described by Senator Edmunds in the congressional debates, such as those directed at classes because of their political views or religion. 463 U.S. at

837.[16] Instead, the Court found no evidence that the Klan "had a general animus against either labor or capital, or .... against enterprising persons trying to better themselves," *id.* at 838, and out of reluctance to "extend § 1985(3) into the economic life of the country in a way that we doubt the 1871 Congress would have intended," *id.* at 837, refused to read the statute to prohibit defendants' pro-union animus. *Id.*

The district court in this case found invidious class animus on the ground that "[p]laintiffs' members and patients constitute a subset of a gender-based class," with discrete, insular and immutable characteristics. *National Organization for Women v. Operation Rescue*, 726 F. Supp. at 1492. The court also described Operation Rescue's conduct as "a conspiracy to deprive women seeking

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[16]Senator Edmunds explained, in now-familiar terms, his understanding of

> that equality of protection ... which the Constitution of the United States gives.... [I]f, in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter ... then this section would reach it.

Cong. Globe, 42d Cong. 1st Sess. 567. In his view, only in instances of purely personal malice, such as "a neighborhood feud of one man or set of men against another," would the statute not apply. *Id.*

abortions of their rights guaranteed by law ...." *Id.* at 1493. The Fourth Circuit properly upheld the finding of gender-based animus, recognizing that "animus against classes defined by 'race, national origin and sex' meet [the] requirement of class-based animus within [the] meaning of 1985(3)," 914 F.2d at 585, (*following Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985)). Findings of class animus, like findings of intent, are "peculiarly factual issues for the trier of fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), (quoting *U.S. v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)). The district court's findings, affirmed by the court of appeals, are not "clearly erroneous" and must therefore be accepted by this Court. Fed. R. Civ. P. 52(a).

The class animus motivating Operation Rescue's conspiracy meets even the most restrictive class-animus test that could fairly be derived from the statute, this Court's prior § 1985(3) cases, and the legislative history. At a minimum, § 1985(3) prohibits conspiracies motivated by animus toward groups, including women, that are specially protected under the Fourteenth Amendment. Neither Petitioners nor the United States contends that conspiracies motivated by animus against women are not covered. The

1871 Act was written in part to enforce the Fourteenth Amendment, which affords special protection to women.[17]

The distinction that petitioners, and *amici* in their support, attempt to draw between animus against women and animus against abortion is both factually and legally untenable. As a factual matter, only women have abortions. Women's procreative capacity is a fundamental aspect of their gender identity. In recognition of this close nexus between pregnancy-related conditions and gender, Congress in the context of Title VII of the Civil Rights Act of 1964 has as a matter of law defined discrimination based on preganancy-related conditions as sex discrimination. Under Title VII, discrimination because of "pregnancy, childbirth, or related medical conditions" is discrimination "because of sex." 42 U.S.C. §2000e(k).[18]

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[17]The Court's failure in *Griffin*, 403 U.S. at 102, to assume that gender bias, too, would necessarily be prohibited under a statute enforcing the Fourteenth Amendment may be explained by the fact that at that time the Court had not yet recognized women as a class entitled to special constitutional protection. *See, Frontiero v. Richardson*, 411 U.S. 677 (1973).

[18]In amending Title VII to prohibit discrimination based on pregnancy-related conditions, Congress expressly rejected the contention defendants here advance that abortion is an "activity" somehow separable from the gender of women who seek it. In overturning *General Electric Company v. Gilbert*, 429 U.S. 125 (1976), Congress codified the "commonsense [notion] that since only women can become pregnant, discrimination against pregnant people is

Because it is a question of statutory construction whether anti-abortion animus is sex-based animus under the Civil Rights Act of 1871, the Congressional definition of sex discrimination in the context of Title VII should be applied. Abortion is a pregnancy-related condition. It is inconceivable that Congress would prohibit an adverse employment action on the basis of abortion, yet permit it as the basis for conspiratorial mob action.[19]

Griffin looked to the legislative history of § 1985(3) when it identified the requirement class animus, 403 U.S. at 102. That history is an additional source of guidance in identifying the requirement's scope. The Congressional debates identified in *Griffin* as the source of the class animus

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necessarily discrimination against women...." *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (quoting 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins)).

[19]The Solicitor General's reliance on *Geduldig v. Aiello*, 417 U.S. 484 (1974), is inappropriate for three reasons. First, the Fourteenth Amendment does not place a ceiling on what Congress can do to redress inequality, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), so the meaning of class animus is a matter of statutory, not constitutional, interpretation. Second, the Court in *Geduldig* granted deference to the state's interest in maintaining an economically viable insurance program, and no similar deference is owed to a private conspiracy seeking to impede the exercise of fundamental rights. Third, that case involved withholding benefits, not affirmatively interfering with the exercise of a right. The "distinction between benefits and burdens is more than one of semantics," *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977). If a government employer had discharged Aiello for becoming pregnant, it would have violated equal protection.

requirement, *see* 403 U.S. at 102, were those discussing Representative Shellabarger's amended version of § 1985(3). These debates reflect Congress' understanding that the classes protected by the statute encompass more than racial classes. Definitions of class animus tied to any number of invidious distinctions, such as a group's historical experience of discrimination, its political vulnerability, or even the constitutional importance of the rights it seeks to exercise are all consistent with the legislative history of the statute.

Representative Shellabarger introduced the Bill as amended to reflect Congress's intention that the deprivation clause remedy not all conspiratorial deprivations of rights, but only those with invidious animus:

> The object of the amendment is, as interpreted by its friends who brought it before the House, so far as I understand it, to confine the authority of this law to the prevention of deprivations which shall attack the *equality* of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.

Cong. Globe, 42d Cong., 1st Sess. 478 (Rep. Shellabarger) (emphasis added). No representative ever sought to enumerate, much less circumscribe, the classes that would

have standing under § 1985(3) for invidiously motivated deprivations of their rights. Representative Dunnell listed some of the types of invidious animus with which Congress was then concerned:

> This law is asked for the protection of every class of citizens. We demand it not simply for the black man, but for the Union men of the South, and even for the ex-rebels who would now yield obedience to the Government.

Id. at App. 262. Senator Boreman discussed the groups which the Fourteenth Amendment empowered the Congress to protect by enacting remedies for conspiratorial violations of their rights:

> It is not restricted to guarantying [*sic*] the right of a "citizen" of a northern State to go into the South, the citizen of a southern State to go into the North, and be shielded and protected as such, but it extends to every "person," whether he has come from another State or not, to every person residing anywhere, everywhere, within the United States. So that while, before this amendment, if there was any question whether there were any class of persons in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Id. at App. 229. The few Congressmen who objected to the apparent breadth of the protected classes did *not* attempt to amend the Bill to protect against racial discrimination only, or to cover only those groups the Ku Klux Klan was actually

attacking at the time, but simply advocated that the Bill not be passed.[20]

The understanding of Congress, both supporters and detractors, was that the 1871 Act would prohibit invidious animus against members of any vulnerable class or group, whether its vulnerability derived from immutable characteristics, a history of oppression, or a precarious grasp on newly bestowed rights, as was true for the freed slaves, or from a functional position as a political and cultural minority in the midst of a hostile majority, as was true of the Northern Republicans. The efforts of Operation Rescue to wrest women's abortion rights from them by mob action undermine legal protection when women need it most. Women as a class are afforded special protection under the federal Constitution and other civil rights statutes. The immutable characteristic that distingushes them as a class is their procreative capacity. A conspiracy that seeks to

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[20]Representative Harris, opposing the Bill, said "[t]here is one good feature in this bill; that is, it applies to all." *Id.* at 484.

For objections to the breadth of the Bill on other bases, *see, e.g., id.* at App. 139 (Rep. McCormick); *id.* at 572 (Sen. Stockton); *id.* at 576 (Sen. Trumbull).

deprive them of legal protection on that ground should not go unchecked under § 1985(3).

CONCLUSION

For the reasons stated in the foregoing brief of *Amicus Curiae* the NAACP Legal Defense and Educational Fund, Inc., the decision of the United States Court of Appeals for the Fourth Circuit Court should be affirmed. The LDF advocates reliance on law to protect equal enjoyment of civil and constitutional rights. The hindrance clause is a crucial safeguard for the enforcement of state and local law against private persons seeking to take law into their own hands through mob force. The injunction in this case has enhanced the equal enforcement of state law to all persons in Virginia without regard to their gender and their exercise of unpopular rights, and should not be disturbed.

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